Minutes of the Board of Adjustment meeting held on Monday, March 9, 2009, at 5:30 p.m. in the Murray City Municipal Council Chambers, 5025 South State Street, Murray, Utah.

Present: Wendell Coombs, Jr., Chair
Joyce McStotts, Vice-Chair
Rosi Haidenthaller
Jonathan Russell
Connie Howard
Tim Tingey, Community & Economic Development Director
Ray Christensen, Senior Planner
G.L. Critchfield, Deputy City Attorney
Citizens

There was a Staff Pre-Meeting held where the Board of Adjustment members briefly reviewed the applications. An audio recording is available for review in the Community & Economic Development office.

APPROVAL OF MINUTES

Wendell Coombs asked for additions or corrections to the minutes of January 12, 2009. Joyce McStotts made a motion to approve the minutes as submitted. Rosi Haidenthaller seconded the motion.

Voice vote was taken. Minutes approved 5-0.

Mr. Coombs explained that variance requests are reviewed on their own merit and must be based on some type of hardship or unusual circumstance for the property and that financial issues are not considered a hardship.

CONFLICT OF INTEREST

There were no conflicts of interest for this agenda.

APPROVAL OF FINDINGS OF FACT

Rosi Haidenthaller made a motion to approve the Findings of Fact for Wasatch C.N.G. Jonathan Russell seconded the motion.

Voice vote was taken. Minutes approved 5-0.

CASE #1372 – DOUG ORTON – 694 West 5900 South

Doug Orton was the applicant present to represent this request. Ray Christensen reviewed the location and request for a front yard setback variance for a porch with stairs constructed at the front of the dwelling without a permit at the property addressed 694 West 5900 South. Murray City Code Section 17.100.080.A: "Residential building lots in this zone district (R-1-8 zone) shall meet the following minimum yard requirements. Front Yard: The minimum depth of the front yard shall be twenty five feet." The property is located on 5900 South Street in an area of single family homes. The property is zoned R-1-8 which is single family low density residential. There is currently an older single family residential dwelling located on the lot. The building department received a complaint the property owner Doug Orton was building a deck and stairs on the front of the house. The building inspector inspected the property and found there was no building permit and put a Stop Work Order Notice on the property. The deck which has been constructed is in violation of the zoning regulation for front yard setback. The city engineer stated the setback of the deck to the front property line

is 21 ft., whereas the minimum setback required by the zoning regulations is a 25 ft. front yard setback. The property is similar is size and area with other lots in the general area. The property is not odd shaped and meets other standards of the ordinance related to lot width, building setback and building height. Analysis of the site plan submitted with the variance request indicated adequate space on the site to meet the required front yard setback. There is an existing concrete landing and stairs under the deck which meet the required setback. With a review of other properties in the area, the homes meet the general setback requirements. The Murray General Plan has established specific land uses including residential land uses which have specific regulations to promote the general welfare. A variance in this instance would be contrary to the public interest. The goal of the ordinance is to keep properties in compliance, and varying from the ordinance is not in keeping with the general plan. Based on review and analysis of the application material, subject site and surrounding area, and applicable Murray Municipal Code sections, the Community and Economic Development Staff finds that the proposal does not meet the standards for a variance. Based on the above, staff recommends denial of the variance.

Doug Orton, 5725 South 665 West, stated that he owns the property located at 694 West 5900 South.

Wendell Coombs asked when the home was built and was the property line adjusted when the curb and gutter were installed, or was the road widened. Mr. Orton responded the home was built in 1940. Mr. Christensen responded that he was unaware that the road, curb, gutter and sidewalk had been widened and did not affect the property lines.

Mr. Coombs stated that he thought the curb and gutter may have moved since the home was built and may have encroached into the property, and thought that the intersection had been widened and that there was no sidewalk years ago when he was a kid. Mr. Christensen responded that he was unaware of any widening of the road, curb, gutter or sidewalk.

Doug Orton stated that he is in need of a variance. He stated the home was built in 1940 and probably before 5900 South Street was finished. He assumed the property line was measured from the top back of curb which is 27 feet. He also assumed that he would not need a building permit to install a front porch because of the square footage of the porch. Because of the building permit issue, the setback situation was raised at that time. The setback from the porch to the back of the sidewalk is 21 feet and from the back of the sidewalk to the curb is an additional 8 feet. He stated he has remodeled the home and improved the property over the past few years. Mr. Orton stated the recorded plat indicates the length of the property to be 249 feet. When he measures 249 feet from the back property line, it extends into the middle of the road.

Mr. Orton stated he sold a piece of property to Murray City in order to construct the new fire station on 5900 South and everything in that subdivision, including the fire station, is measured from top back of curb.

Jonathan Russell asked the exact variance measurement. Mr. Orton responded that there is a 3.5 foot difference between the old porch and the new porch. Theoretically, if he cuts off the 3.5 feet of the porch, which he does not wish to do because the deck is complete, he would be in compliance with the setback. Mr. Christensen stated the city

engineer, Scott Stanger, reviewed this situation and indicated that the porch is 21 feet setback from the front property line (4 feet encroachment into the setback).

Mr. Russell complimented Mr. Orton on his efforts to clean up and improve the property.

Richard Allen, 694 West 5900 South, stated he is renting the home from Mr. Orton. He stated that he and his wife are responsible for cleaning up the property, installing the fence and the new front porch. He stated the old porch was an eye sore and the cement was so hard that a compression drill gun could not even drill the concrete and the new porch is a much needed improvement.

Jonathan Russell made a motion to grant a 4 foot front yard setback variance for Mr. Orton. He stated in reviewing the criteria for granting a variance, sometimes it is difficult to say absolutely yes, but there is some give on situations. He sated the Board wants to be respectful of the property owner and the owner should be able to enjoy their property. He stated this request is an improvement and the literal enforcement of the ordinance would cause a hardship. He stated he felt there are special circumstances attached to this request such as the age of the property, what was there, and there is a little bit of question as to where the property line is and what the setback is. The hardship associated with this variance is basically that the home was built in 1940 and there may be a preexisting condition, and not knowing exactly where the property line really is. Rosi Haidenthaller seconded the motion with the reasoning of the original plat indicates a property length of 249 feet.

Call vote recorded by Ray Christensen.

N Mr. Coombs
A Ms. Haidenthaller
N Ms. McStotts
A Mr. Russell
N Ms. Howard

Motion failed 3-2.

Connie Howard made a motion to deny the variance as requested based upon the Findings of Fact which are enumerated in Section 5 a-e, and that the Decision in Summary of those Findings of Fact as listed in Section 6 of the Board of Adjustment packet. Seconded by Joyce McStotts.

Call vote recorded by Ray Christensen.

A Mr. Coombs
N Ms. Haidenthaller
A Ms. McStotts
N Mr. Russell
A Ms. Howard

Motion passed 3-2. The variance has been denied.

Joyce McStotts made a motion to accept the Findings of Fact as provided for Doug Orton, Case #1372. Seconded by Connie Howard.

Call vote recorded by Ray Christensen.

A Mr. Coombs
A Ms. Haidenthaller
A Ms. McStotts
N Mr. Russell
A Ms. Howard

Motion passed 4-1.

APPEAL CASE #1373 – ROBIN BRADY – 89 West Woodrow Street

Phillip and Robin Brady were present to represent this appeal request. Tim Tingey, Director of Community and Economic Development, reviewed the request for an appeal of the Community and Economic Development Director's decision that the property located at 89 West Woodrow Street is a single family dwelling use and that any of the nonconforming status that the property may have had was lost in 2002 and that a proposed use of a secondary dwelling at this site is not allowed per the current zoning ordnance, and is not allowed through a Conditional Use Permit. The property is located within the R-1-8 (residential) zoning district. The property was constructed in approximately 1949 and at that time the zoning designation allowed for duplex and above when originally built. In 1957 the zoning ordinance changed and the designation allowed for residential single family dwellings, but not two family dwellings. From 1957 on, with all the modifications of the zoning ordinance, the uses that have been allowed have been R-1-8 uses which are single family dwelling units. Any dwellings in this area that were two-family, three-family or four-family units became nonconforming based on the 1957 ordinance. The 2007 ordinance gives information similar to what was previously stated, but also gives information on nonconforming uses. It allows that legally established uses prior to the ordinance adopted in 2007 were allowed to continue as long as they were not changed or interrupted for a period of one year. That is a typical rule in zoning ordinances across the nation, which is referred to as a vacancy rule. Usually there is one year or less to continue the use, or if it is interrupted for that amount of time, the nonconforming status is then lost. Additionally, in 2002 until 2007, the ordinance was modified to allow for a six-month vacancy rule. It did not exempt dwelling units, but the current ordinance does exempt dwellings units.

Mr. Tingey stated the staff researched the property and the county records show the property as single family classification as well as utility bills back to 1980 show the property having one meter, in addition to the conversations and subsequent conversations with the applicant representing that the property had not been rented at least during the time of 2002-2007. The applicants provided this information with additional evidence provided. He stated that any conforming status that may have once existed was lost, at a minimum, because of the 2002 ordinance. The applicants have provided tax returns for 1998 and 1999 showing that the owner of the property had some form of rental income at that time, but there has not been anything such as tax records provided from 2002 to 2007. In addition, the applicant materials included signed notarized statements from neighbors providing evidence that the property at one time was a two-family unit, but there is no additional evidence that from 1998, beyond the tax records, that the building was anything other than a single family use. In addition, the Utah code 10-9a-511 indicates that the applicant has to provide information related to this and the burden of proof is on the applicant. Other information that the city would need to provide, a burden on the vacancy, has been provided based on the information that the applicants discussed with himself, as well as the records the city has researched.

Mr. Tingey stated that based upon this information, the city staff has reach the conclusions as out lined in the staff report: 1- The home was built in 1949 and the ordinance changed in 1957; 2- The utility and county records and conversations held between staff and the applicants; 3- The ordinance changed in 2002 allowing a six month vacancy rule exempting dwellings in place at that time; 4- The nonconforming status was determined, especially from the 2002 to 2007 time period and the applicant has not provided sufficient evidence that would change that determination. Based upon this information, the Community & Economic Development staff is recommending denial of the appeal.

Robin Brady, 1188 West 8830 South, West Jordan, stated she is the owner of the property at 89 West Woodrow Street. She stated that the determination was based on a conversation between her husband, Phillip Brady and Mr. Tingey. She indicated that Phillip Brady will be presenting the facts.

Phillip Brady, 1188 West 8830 South, West Jordan, referred to Mr. Tingey's staff memo for determination of the nonconforming status of the property. He stated that the property was: 1- Legally established as a duplex from the time of construction which was 1949. 2- The zoning ordinance was changed in 1957 and several times through the years from then on. He stated he has another zoning map that shows it as conforming in 1963 and beyond and he was unsure of how many times it changed back to where it was legal for duplexes, three-plexes, etc. He stated that the current code exempts dwellings from any vacancies. He asked if this process is using codes that have been repealed from 2002 to 2007 or using current codes. 3- Current code 1.04.110 from 2008 codes repealed any existing codes at that time and the only way that allowed use of a repealed code was if there were any actions pending. 4- In a conversation with Phillip Brady who was inquiring about a second meter at the site in late summer of 2008 which he states "Mr. Brady had indicated that the property had not been used as a two-family dwelling from 1998 to the present and adding a second meter, using the property as a duplex that the nonconforming status was lost due to a vacancy rule." Mr. Brady stated that the only vacancy rule he could find in Murray City ordinance is the current ordinance, the 1998 ordinance and the 1990 ordinance. All of those exempted dwellings, if there was a vacancy. The 2002 ordinance was not a vacancy ordinance, it stated that it was an abandonment ordinance. 5- This was Mr. Tingey's determination. 6- Mr. Tingey has brought up the issue that there has been one power meter since 1980. There was also a building permit that was issued for the second meter in 1998 that was never finalized. There were two inspections made. The owner at the time, for whatever reason, decided he didn't want to change it because he would have had to spend more money and did not follow through with putting the second meter on. That was a permit that was issued legally by the city. The code at that time, which was 1998, exempted dwellings from any vacancies. 7- County records are for tax purposes only. Mr. Brady stated that Ray Christensen confirmed this in a June 9th Board of Adjustment meeting.

Mr. Coombs stated that any information that is "new" and is not included in the Board's packet of information is not allowed at this appeal. Mr. Brady responded that this information is in the packet and that it indicates that tax records are not to be used for a zoning issue.

Mr. Brady stated that item #8- The applicant has submitted tax records for 1998 and 1999 which were submitted to show that there was rental income from 1998 and 1999. The owner at the time, Max Swenson, was still renting it after he decided not to change the dwelling to two meters. Although, there were two gas meters. 9- Director Tingey provided the copy of the code 10-9a-511 related to nonconforming uses. In that, it spells

out quite clearly if there is an issue of abandonment which he has claimed here. The city has the burden of proof to provide that it was abandoned (section 10-9a-511. (4b)).

Mr. Brady stated that Mr. Tingey's conclusion/recommendations indicated that the home was built in 1949 and prior to 1957 the code changed but, the code changed again in 1963 to allow two-family and three-family uses. Utility records indicate that since 1980 there has only been one power meter, one water meter, and county records designate the use as a single family. This confirms that the use of the building has never been vacated, never been abandoned. The one power meter has been there since the building was built and it has been rented for all those years and Max Swenson wanted it that way. Mr. Brady stated that based on a conversation that Mr. Tingey had with Mr. Brady he states that the property was not used a secondary dwelling since 1998. That was based on an assumption that he had, and his assumption was incorrect. He stated he has the tax records to show that it was rented beyond that time and evidently Mr. Tingey has made his assumption based on his assumptions that were incorrect. Mr. Brady continued with #5- The nonconforming status was determined by the Community & Economic Development Department to have lost is conformity between 1998 and 2007. He stated that according to Mr. Tingey's letter for the denial of the second meter was based on a vacancy rule from the current code from a repealed ordinance code from 2002 to 2007, based upon an assumption. Once again Utah Code states clearly that the burden of proof is on the entity claiming abandonment in this issue and the applicant has not provided sufficient evidence.

Mr. Brady summarized that the building at 89 West Woodrow Street was legally constructed as a duplex in 1949. Since that time the underlining zone of the property has changed several times. The zoning is now R-1-8 making the duplex a legal nonconforming use. The duplex was established as a legal nonconforming use by the applicant, Murray city staff for the first time in 1998 when a permit was issued for a secondary electrical meter. Now, Director Tingey, and his staff have also established that fact that the entire building is legally nonconforming. According to the Utah League of Cities and Towns handbook there are two types of nonconformity. #1 – Nonconforming structures. #2 – Nonconforming use of land. The land under this duplex has been used as a duplex since 1949 and that use has never changed. The use of the house, which is a duplex, which has not changed and the building has never been remodeled or changed to be used as a single family dwelling. It has always been maintained and used in the same manner. He stated he is unaware of any city code that requires each unit in a multi-family building to be rented. If this were the case, any vacancy that occurred in a multi-occupancy building that is nonconforming would lose its use at that point. By reading the Murray City vacancy code, he does not see any difference from one unit to 50 units. This building has never been vacant, it has never been abandoned. He stated that Director Tingey and his staff have submitted no evidence to the contrary.

Jonathan Russell asked how long Mr. Brady has owned this property. Mr. Brady responded that he and his wife are joint owners with her brother Scott Swenson and have owned the property since July 2008. Robin Brady and Scott Swenson grew up the dwelling that was previously owned by their father Max Swenson.

Mr. Russell asked if there are other multi-family units in this neighborhood. Mr. Brady responded there is a four-plex to the east and a duplex to the west of the property in question.

Mr. Russell asked Mr. Brady if he is stating that from 1998 to 2007 the property has always been rented. Mr. Brady responded that he can't say for sure that it has always

been rented, but he can say absolutely that it has never been abandoned and it has never been vacated. When he purchased the property the owner previous owner had been living in the front, but there was no one in the back unit.

Rosi Haidenthaller asked Mr. Brady about the additional documentation of evidence of the unit being rented between 2002 and 2007 and if this additional information has not been show to Mr. Tingey. Mr. Brady responded that the point he attempted to make is that Murray City code does not require a rental unit to be rented. It was available for rent as far as he knows, but he was unsure as to what extent that it was rented. He stated the assumption that he indicated to Mr. Tingey that it wasn't being rented was incorrect and that Mr. Swenson rented the property beyond what he originally thought. Mr. Brady commented that the Murray City code does not indicates that the property must be rented in any way, shape or form. His argument is rented/vacant verses abandoned. He stated that the vacancy code or the abandonment code requires the property to be rented. He stated this is a situation where rent verses the use of a building. If that were the case for instance, if one unit of a twelve unit dwelling were empty, then the nonconforming status would be lost. He stated that the code does not differentiate between the number of units. In the Utah code it states that if the primary structure is abandoned it is considered abandoned, but the primary structure in this case which is only one structure was never abandoned or vacated.

Connie Howard stated that abandonment is "discontinued use for a year" which is cited in Utah code 10-9a-511: "Any party claiming that a nonconforming use has been abandoned shall have the burden of establishing the abandonment", and subsection C cites: "Abandonment may be presumed to have occurred if…(2) the use has been discontinued for a minimum of 1 year or….(3) the primary structure associated with the nonconforming use remains vacant for a period of 1 year." She clarified that the code refers to "either/or". Mr. Brady stated, in his opinion, that the code does not discern between a building or the number of units.

Connie Howard stated that it would be different where there is a different zoned area where there are multiple, dense populations and there are multiple uses, as opposed to this situation where it is a residential area where there is nonconforming structures and an individual could apply for a nonconforming use, which would be the multiple dwelling. Then the applicant would need to meet the requirements for not vacating the property for more than one year. She stated that this property is nonconforming because the second unit is an appendage to the main unit, but is still one unit. She stated the Utah code is written this particular way to address these situations. She stated that the code refers that its nonconforming has to be a maximum of one year of non-rental. Mr. Brady stated he did not see where the code refers to "rental".

Ms. Howard cited the state code: "Abandonment may be presumed to have occurred if the use has been discontinued for a minimum of one year, or the primary structure associated with the nonconforming use (which is the rental unit) remains vacant for a period of one year."

Ms. Howard asked Mr. Tingey for clarification about which definition is the city using for abandonment. Mr. Tingey responded that the definition is the city's 2002-2007 definition. Mr. Brady stated the uneasiness about using this definition is that the 2002-2007 code was repealed. He asked if they are able to use a code that has been repealed.

Wendell Coombs stated even if the code has been repealed, if the property lost its nonconforming status during that time frame, it is still lost. Mr. Coombs stated once the nonconforming status is lost, the opportunity is lost whether the law was repealed or not.

Connie Howard commented that unless Mr. Brady has additional information showing that the property was in use and was rented during 2002-2007. If there was a one year period of time at anytime during 2002-2007 that it was not being rented, the property went from nonconforming to loss of the nonconforming status.

Mr. Brady stated that he cannot say the dwelling was not rented, and Mr. Tingey cannot either. The city, being Mr. Tingey and his staff, has to prove that it wasn't rented according to state law. Mr. Coombs responded that comment is incorrect and the burden of proof is on Mr. Brady to prove that it maintained it legal existence of the nonconforming use.

Mr. Brady stated that he has established the legal existence of the property and section 10-9a-513 (4) (b) states: "Any party claiming that a nonconforming use has been abandoned shall have the burden of establishing the abandonment," which would be the city. At this point the city is the one to establish the abandonment and the city is claiming abandonment.

Joyce McStotts questioned if the property had lost its conforming status before Mr. Brady even purchased the property. Mr. Tingey responded the city is stating that the property lost its nonconforming status between the years of 2002-2007 which is when the ordinance gave that rule of six months abandonment. In addition, the city has indicated three areas for determining that the nonconforming use has been abandoned based on the following: 1- More than one conversation held with the Brady's; 2- The information from both county and utility records and the burden upon the property owner as it states in the code is "That unless a municipality has established by ordinance a uniform presumption of legal existence of nonconforming uses, the property owner shall have the burden of establishing the legal existence of nonconforming uses. The property owner shall have the burden of establishing a legal existence of a noncomplying structure or nonconforming use", which the city has established.

Mr. Brady stated that the legal establishment of nonconforming use was established when it was built in 1949. He stated that the city has not shown any evidence to say that the property wasn't being used as a duplex during that time period. Ms. Howard responded that was lost sometime between 2002 to 2007. Ms. Haidenthaller commented that Mr. Brady has not show any evidence that the nonconforming use has not been lost. She asked if there is sufficient amount of evidence in order to postpone this decision tonight. She stated unless there is an overwhelming amount of new evidence that would behoove the Board to overturn the Director's decision or to continue this decision, the Boards hands are tied.

Mr. Brady asked if they are allowed to use an ordinance that has been repealed. Ms. McStotts responded the ordinance was not repealed at the time it occurred. Mr. Brady responded that they don't know that it even occurred.

Ms. Howard stated the Board has been given information provided by Mr. Brady and Mr. Tingey that will be reviewed to determine whether Mr. Tingey made assumptions or made a decision based on correct information.

Mr. Brady commented that Mr. Tingey used two different ordinances when he made his decision, the current ordinance and the repealed ordinance. He stated in the repealed

ordinance it indicates that ordinance cannot be used once it has been repealed unless there is a pending action.

Joyce McStotts asked Mr. Brady if he is currently using the property as a duplex. Mr. Brady responded that he currently is not using the property as a duplex and that he has not been able to do so because of the nonconforming determination from the Community & Economic Development Department.

Joyce McStotts asked Mr. Brady if he is going to be living in this dwelling or renting the dwelling. Mr. Brady responded that decision has not yet been determined, but the primary unit is currently being rented out.

G.L. Critchfield, Deputy City Attorney, stated that when determining these types of issues, the facts must be based upon the laws of the same time period. The fact that the ordinance was repealed does not go back and change the facts at the time the issue occurred. If at some point there is a nonconforming use, and if at any time that nonconforming use is lost, it is lost forever whether the laws change later in time or not.

Mr. Coombs stated the only way this property could be conforming, would be change the zoning that would allow duplexes and multi-family units. This process would be through the Planning Commission and City Council.

Mr. Brady stated if the Board is going to rule on the case, and by law, the Board should rule in his favor because he has seen no evidence submitted to the contrary.

Wendell Coombs stated as the Board reviews this case, the Board should contemplate whether the use authority (Mr. Tingey) had correctly interpreted the factual situation, did he correctly apply the law as written, and was there due process or any rule of procedure that was not carried out. As part of this discussion, the Board will need to determine whether he interpreted the facts of the situation based on the information he had.

Connie Howard commented that when the Board decides these appeal cases, the Board either goes with what was previously decided or finds that there was error in the decision and rule against the decision. She stated that Mr. Tingey is very interested in making sure that whatever information is available, that he has access to it so as to overrule himself and change his mind. She stated if Mr. Brady has additional information that would help, Mr. Tingey is very willing to entertain that information. The Board must make their own determination based upon the record that has been given to them that was submitted both from Mr. Brady and Mr. Tingey. She stated that the Board could postpone a decision on this matter in order to give Mr. Brady an opportunity to submit additional information, or the Board can make a decision based on the information submitted.

Robin Brady asked about the gas meters. She stated that when she wrote her letter she indicated the fact that there was two gas meters and so the evidence Mr. Brady was going to present were gas bills to show that the fuel had never been disrupted. She indicated that Mr. Tingey had indicated that the electrical had never been disrupted, but that is because it goes both places which means that there could have been someone at the property during that time of 2002-2007 and there isn't anyone that can say there was no one living there. The issue that Mr. Tingey based his information on was the fact that Mr. Brady had previously indicated that the property had been vacant from 1998-1999 which was of course proven to be incorrect.

Connie Howard stated that Mr. Tingey did his own research and looked at the gas meters, etc and he did not see where there was a second operating meter and that there was a single dwelling. She asked Mrs. Brady if she has additional information. Mrs. Brady responded that if there is a question as to whether there had been two gas meters, the service has never been disrupted and that was mentioned in her letter about the gas meters. She stated that they did not sign up for to have gas for the two meters, but they did change the name on the accounts.

Rosi Haidenthaller stated that there may have been two meters, but there is no evidence that the meters were operating and had tenants in the units. The meters could have been set at a minimum temperature and not be occupied. She stated that the Brady's have the burden of proof to prove that the unit(s) were occupied and if they can prove that the dwellings were occupied during those years and did not lapse for 12 months, then there is a possibility that this case can be reopened.

Phillip Brady stated the burden of proof is on the city, by state law.

Robin Brady stated that she feels they are being denied the use of their property because the two adjacent property owners do have multiple units. She stated to the east is a four-plex with two electrical and two gas meters and to the west is a duplex. Down the street 200 feet is a commercial daycare and also a large office building. There has been numerous changes occurring in this area and they have recently just gone through the neighborhood obtaining signatures in regards to making this a mixed use area. She stated this is their last resort to get an electrical meter and this is an extenuating circumstance where the area is being primarily used for multiple family and their property is located between two multiple family units and it makes no sense not to allow them to continue the same use. These issues make this an extenuating circumstance and the fact that the zoning has been changed across the street to office use.

Wendell Coombs asked what options are available to the applicants if they lose their appeal. Mr. Tingey responded the applicants could appeal the decision of the Board of Adjustment through the court processes and/or they could apply to change the zoning for their property. There is no allowance for a conditional use permit under the current code.

Rosi Haidenthaller stated that "The property owner establishes the legal existence of a noncomplying structure", which Mr. Brady did, but then it says the "party claiming the nonconforming use has to prove it…." and Mr. Tingey has tried to prove this. The code reads further to state: "the property owner may refute the presumption of abandonment under subsection 4c and shall have the burden of establishing that any claimed abandonment under subsection has not in fact occurred."

Ms. Haidenthaller stated that Mr. Brady has the burden of proof that the property was not abandoned.

Mr. Coombs asked for additional comments or a motion.

Jonathan Russell commented that the Board is between a rock and a hard place. There are a lot of rental units in the area and questioned the city's desire going forward, but there are certain ordinances that have been put in place and the Board must uphold those ordinances. Based on the record it is pretty clean cut to him. If there is additional information that the Brady's have that they could share with the city that would be suggested or the Brady's proceed with a proposal for the Planning Commission.

Connie Howard stated that the basis of the decision made by the Board of Adjustments must be a reflection of the law as it is stated in the zoning ordinance and based on the information provided to the Board from both parties, she would make a motion that the appeal be denied and let Mr. Tingey's decision stand. This is based on the six criteria of information provided based on the ordinance that was in place between 2002 to 2007 and based on the county records and attachments to the staff information which was provided by each party (Mr. Brady and Mr. Tingey), and the lack of information from Mr. Brady during the years of 2002 to 2007. Seconded by Rosi Haidenthaller.

Call vote recorded by Ray Christensen.

A Mr. Coombs
A Ms. Haidenthaller
A Ms. McStotts
A Mr. Russell
A Ms. Howard

Motion passed 5-0.

Jonathan Russell made a motion to accept the Findings of Fact for Case #1373, Robin Brady. Seconded by Connie Howard.

Call vote recorded by Ray Christensen.

A Mr. Coombs
A Ms. Haidenthaller
A Ms. McStotts
A Mr. Russell
A Ms. Howard

Motion passed 5-0.

Mr. Coombs stated that there are options available to the Brady's such as work with the staff to bring forth a proposal to the Planning Commission or the legal option to appeal this decision to the courts. This has been a difficult situation, but the Board feels the Community & Economic Development Director made a proper decision based on the facts.

OTHER

Mr. Coombs stated that he will be out of town for the April 13th Board of Adjustment meeting and asked if there were any others planning to be out of town. No comments were made.

Meeting adjourned.

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Ray Christensen, AICP
Senior Planner